

CHAPTER 771-AGENCY GRIEVANCE SYSTEM
SUBCHAPTER 4 - AGRICULTURE GRIEVANCE SYSTEM

4-1 Authority

(a) Under the provisions of Title 5, Code of Federal Regulations (C.F.R.), Part 771, Subpart B, 771.201, et. seq. the Department is required to establish an agency grievance system, to publish it, and to make copies available to its employees.

(b) Under the provisions of Title 5, C.F.R. Part 430.407(e), Performance Management and Recognition System (PMRS) employees are, upon request, to be afforded reconsideration of their ratings under procedures which comport with 5 C.F.R. Part 771.

(c) The Department's grievance system and PMRS reconsideration system are set forth in Appendix A and Appendix B of this Chapter.

4-2 Responsibility

(a) The Chief, Employee Appeals Staff, (EAS), CP, is responsible for developing and maintaining the Department's Grievance System; for issuing authoritative determinations on all matters associated with the System; for reviewing the grievance processing performance of agencies of the Department and for making recommendations for improvement to appropriate officials.

(b) Agencies are responsible for ensuring that systems for the timely and fair consideration of employee grievances and the reconsideration of PMRS ratings are established, communicated to employees, and followed. Such systems shall be in accord with the provisions of Appendices A and B. Deviations from those provisions must be approved in advance of publication by the Chief, EAS.

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A-1 GENERAL DEPARTMENT POLICY

The Department recognizes that disagreements will occur between employees and management from time to time and that it is to the benefit of all concerned to resolve such issues as promptly and as equitably as is possible. To that end, it is the Department's policy that disputes over the matters covered by the Administrative Grievance Procedures (outlined below) will be resolved at the lowest level possible with due regard to applicable regulations, including timeliness.

It is the Department's policy that no action will be taken against an employee for filing or considering the filing of a grievance. Reprisal, intimidation, coercion or restraint because of grievance activity or contemplated grievance activity is a Prohibited Personnel Practice which may constitute a basis for disciplinary action. In like manner, employees who provide information concerning matters at issue in a grievance or who act as representatives are to be free from reprisal, intimidation, coercion or restraint.

The Department recognizes that it would be inappropriate to take action against a supervisor solely because subordinates have filed grievances.

A-2 DEFINITIONS

- a. Grievance - A request by an employee or a group of employees, acting as individuals, for personal relief in a matter of concern or dissatisfaction which is subject to the control of agency management.
- b. Factfinder - (Also Grievance Examiner) A person appointed by the Chief, EAS, OP, USDA, to conduct appropriate inquiry into a grievance and to render a recommended decision on the issue(s) at hand. The factfinder must be an individual who has not been previously involved in the matter being grieved and who does not occupy a position subordinate to any official who recommended, advised, made a decision on, or who otherwise is or was involved in the matter being grieved.
- c. Grievance File - A tabbed and indexed file established expressly for the purpose of creating and preserving a record of all documents and evidence pertinent to a grievance. This includes, but is not limited to, letters and memoranda generated by the person filing the grievance and by the involved supervisors, statements of witnesses and official records and documents upon which the proposed and final dispositions of the grievance are based. The grievance file may not contain any document or item not made available to the grievant for review prior to a final decision on the grievance.
- d. Personal Relief - A specific remedy directly benefiting the grievant(s). A request for disciplinary action against another employee is not a request for personal relief. Failure to request personal relief in a grievance may be grounds for rejection of that grievance.
- e. Bargaining Unit Employee - An employee included in an appropriate exclusive bargaining unit as determined by the Federal Labor Relations Authority for which a labor organization has been granted exclusive recognition.
- f. Employee - In addition to the normal connotation, this includes a former employee of the agency for whom a remedy can properly be provided.

A-3 SYSTEM COVERAGE

a. Employees

(1) Employees covered:

Except as excluded below, this System applies to all nonbargaining unit employees of the Department (regardless of the type of appointment) and to all bargaining unit employees not covered by a negotiated grievance procedure.

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(2) Employees excluded:

(a) - Employees listed in Title 5, C.F.R. Part 771.206(b) (Noncitizens, aliens and employees appointed and paid under special and relatively rare authorities not common to the Department of Agriculture).

(b) All applicants for employment unless an agency of the Department specifically provides for coverage of applicants or certain groups of applicants.

(c) All bargaining unit employees covered by a contract except as related to matters specifically excluded from coverage by the negotiated grievance procedure. The parties to the agreement must specifically and affirmatively exclude any matters they do not wish to have covered by the negotiated procedure.

(d) Employees covered by the Foreign Service Grievance System.

(e) Employees of the Cooperative Extension Service who hold Schedule A appointments under 5 C.F.R. 213.3113(a)(1) and serve without Federal compensation.

b. Subject Matter

Except as listed in (2) below, this system applies to any matter of concern or dissatisfaction relating to the employment of an employee which is subject to the control of agency management.

(1) Examples of items covered include:

(a) Working conditions

(b) Improper application of or failure to follow rules and regulations

(c) Unfair treatment

(d) Prohibited Personnel Practices except discrimination based on race, religion, national origin, etc. (covered by the EEO complaint system)

(e) Performance appraisals

(f) Nonselection for training

(g) Suspensions from duty without pay for 14 days or less and letters of reprimand

(h) Coverage under or exclusion from PMRS

(i) Changes in assignments including details and reassignments

(j) The return of an employee serving a supervisory or managerial probationary period to a nonsupervisory/nonmanagerial position unless the agency specifically excludes the matter from coverage.

(k) The separation of an employee during a probationary period for reasons of misconduct unless an agency specifically excludes such an action.

(l) Performance Management and Recognition System appraisals. Note, however, these will be reviewed under modified procedures found in Appendix B.

(m) Allegations of partisan political discrimination

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- (2) Items excluded: [see 5 C.F.R. 771.206(c)]
- (a) Separation of employees serving under Schedule C appointments.
 - (b) Separation of Schedule A and Schedule B employees unless an agency specifically includes such separations.
 - (c) The content of published agency regulation and policy.
 - (d) Matters appealable to or reviewable by the Equal Employment Opportunity Commission, the Merit Systems Protection Board, the Office of Personnel Management or the Comptroller General.
 - (e) Nonselection for promotion from a group of properly ranked and certified candidates or failure to receive a noncompetitive promotion.
 - (f) A preliminary warning notice of an action which, if effected, would be covered under the grievance system or excluded from coverage under (d) above.
 - (g) An action which terminates a temporary or term promotion and which returns the employee to the position from which the employee was temporarily promoted or to a different position (not lower in grade) where the employee is informed in advance that the promotion is only temporary.
 - (h) Reassignment of a Senior Executive Service employee following receipt of an unsatisfactory performance rating.
 - (i) Return of a Senior Executive Service employee to the General Schedule or other pay system during the one year probationary period or for less than fully successful performance.
 - (j) The substance of the critical elements and performance standards of an employee's position.
 - (k) The granting or failing to grant an award or the decision to adopt or not to adopt an employee suggestion.
 - (l) The receipt of or lack of receipt of a performance award or quality salary increase under Sections 5384 or 5336 of Title 5, USC.
 - (m) A decision to grant or not to grant a general increase, merit increase or performance award under the Performance and Management Recognition System.
 - (n) The termination of a probationary employee for unsatisfactory performance.
 - (o) The termination of a SES career appointee during probation for unsatisfactory performance.
 - (p) A performance evaluation of a SES employee.
 - (q) An action taken in accord with the terms of a formal agreement voluntarily entered into by an employee which assigns the employee from one location to another or which returns an employee from an overseas assignment.
 - (r) A salary offset determination which is reviewable under separate procedures established pursuant to the Debt Collection Act of 1982, Public Law 97-365 (5 USC 5514, 5 C.F.R. 550 and 7 C.F.R. Part 3).

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A-4 GENERAL PROVISIONS

a. Representation - A grievant is entitled to be accompanied, represented and advised at any stage of his/her grievance by a representative of his/her choice except that a representative may be disallowed if the agency determines the representative would:

- (1) Be in a conflict of interest or position;
- (2) be required to perform other priority work for the agency; or
- (3) give rise to unreasonable costs to the agency.

If the grievant wishes the representative to receive material from the agency and to act in his/her behalf, a written designation to that effect must be given to the agency.

Any disallowance of a representative must be communicated to the grievant in writing and may be reviewed at the request of the grievant (within 7 days of the disallowance) by the Chief, EAS, OP. Written disallowance of a designated representative shall contain notification of the right to have the matter reviewed, the 7-day time limit and the address to which the request should be sent. The Chief, EAS will render the final decision on the agency's disallowance of the representative.

b. Official Time - The grievant and the representative of the grievant (if a Department employee) shall be granted a reasonable amount of official time to present the grievance. An agency may provide in its regulations for the granting of reasonable amounts of official time to grievants and their representatives for use in preparing grievances.

c. Freedom From Reprisal - Grievants and their representatives shall be free from restraint, coercion, intimidation or reprisal in presenting a grievance. Such actions constitute Prohibited Personnel Practices under 5 USC 2302(b) (9). A grievant or other individual may present allegations of such improper conduct directly to the Chief, Employee Appeals Staff, OP, or, at the grievant's option, the allegation may be made a part of a pending grievance.

d. Resolutions - In keeping with the Department's policy encouraging resolution of grievances at the lowest organizational levels, nothing in these regulations shall prohibit reasonable and good faith attempts by agency managers to resolve a grievance which is being processed, regardless of the stage of review.

e. EEO Complaints - In keeping with the Department's policy to avoid duplicative reviews, a formal grievance on an issue that is encompassed by an EEO complaint will not be processed simultaneously with the EEO complaint. Instead, the official then considering the grievance will inform the grievant that the grievance is being held in abeyance until a final Department decision is reached on the EEO complaint or will return the grievance to the grievant. In the latter situation, the grievant is to be instructed that it is his/her responsibility to resubmit the grievance to the agency official if the grievant desires to have the grievance reviewed further following the decision on the EEO complaint. If the findings on the EEO complaint address the merits of the grievance issue, the grievance may be rejected. If the merits are not addressed, review of the grievance will resume following the final Department decision unless the grievance is not resubmitted by the grievant.

f. MSPB Appeals - For the same reason set forth in A-4e. above, a formal grievance on an issue related to, but not identical to, a matter under review by the MSPB will be held in abeyance or returned to the grievant pending the MSPB decision. For example, a grievance over a performance appraisal will be held pending a final MSPB decision on a WGI - acceptable level of competence appeal. This provision should not, however, be confused with matters excluded from coverage of the grievance system as set forth in A-3b(2) (d) above.

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g. Cancellation - A formal grievance may be cancelled at any step of the process by the person considering the grievance if no relief can be provided due to separation of the grievant, the granting of the relief requested by the grievant, or any other action or circumstance that results in there being no basis for additional relief or retroactive monetary reward. As in the case of rejections of grievances [Section A-6b(2) below], a cancellation of a grievance must be communicated to the grievant in writing and the grievant must at that time be advised of his/her right to have the decision to cancel reviewed by the Chief, EAS, OP.

h. Attorney Fees - There are no provisions for payment of attorney fees or other expenses associated with the filing of a grievance to grievants or their representatives under the grievance system.

A-5 TIME LIMITS

It is Department policy that employee grievances will receive prompt consideration. Expeditionous and orderly processing of grievances is a sound personnel management practice of benefit to management and employee alike. To that end, the following time frames have been established to insure that each grievance will be brought to a prompt conclusion.

It is recognized that variables in agency organization and in the complexities of the issues present in a particular case may, from time to time, necessitate departure from these standards. Such departures will, however, be the exception rather than the rule and, when they occur, the responsible agency official must advise the grievant of the reason for the delay and of the date the grievant may expect action on the grievance to recommence. If action does not take place as promised, the grievant may, without jeopardy to the grievance, elevate the case to the next level in the process. [See also A-5c].

In all instances herein, "days" means calendar days.

a. Filing - A grievant shall present an informal grievance within 15 days of the date of the act or occurrence that is the basis for the grievance or within 15 days of the date the grievant became aware of the act or occurrence. No informal grievance may be rejected for any reason, including lack of timeliness. The informal grievance must be addressed even though it may, in the end, be rejected as a formal grievance, if filed.

b. Agency Consideration - Agencies will have a total of 90 days in which to complete processing of a grievance. This time will be recorded from the date the grievant definitively indicates to the agency that an informal grievance is being initiated. "Completion of processing" means that the agency has either rejected the grievance, cancelled the grievance, resolved the matter to the satisfaction of the grievant or has issued a written proposed disposition of the formal grievance and the grievant has been given the option of requesting further review of the grievance by a Department factfinder. Agencies will determine the amount of time which will be allotted for each of their various levels of grievance processing, keeping in mind the Department's policy of resolving grievances at the lowest level possible and within the 90 days available. The option to elevate the grievance after 90 days shall be clearly communicated to all grievants.

c. Final Decision without Factfinding - Where a grievant requests a final decision by the Agency Head without factfinding, the Agency Head shall render the decision within 60 days.

d. Request for Factfinding - a grievant who has received a written proposed disposition of a grievance will have 10 days in which to request assignment of the case to a Department factfinder for further review. Such a request must be made through the designated agency official who issued the proposed disposition to the grievant.

e. Factfinding - The recommended decision on a grievance referred for factfinding will, under normal circumstances, be issued within 90 days of receipt of the grievance file.

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f. Decision By Agency Head - An Agency Head will adopt the recommendation issued by the Departmental factfinder as the final decision on the grievance, grant additional relief, or exercise the available appeal rights from the recommendation within 15 days of the date of the recommended decision. Extensions of time allowed for appeal will be granted for good cause shown, provided that the request for more time is filed within the 15 day period.

g. Elevation of the Case - If the 90 day period allowed for agency processing above, is exceeded, the grievant may request that the grievance be assigned to a factfinder by the Chief, EAS, Office of Personnel. In such a situation the factfinder will determine the most appropriate and expeditious method of resolving the conflict. At the discretion of the factfinder, mediation may be initially employed to encourage settlement. Mediation will be followed by the issuance of a recommended decision if the mediation does not result in settlement of the case. At his or her discretion, the factfinder may forego mediation, conduct any inquiry which may be necessary and issue a recommended decision to the Agency Head.

h. Decision on Appeal of the Agency Head - The Director of Personnel will issue a decision on the appeal from a recommended decision within 45 days of the date the appeal is received by the Director of Personnel.

A-6 GRIEVANCE PROCEDURES

Agencies are free to structure their grievance procedures as appropriate and practical, taking into account particular organizational and geographic considerations. The procedures shall, however, incorporate the time limits specified in this Chapter and the following minimum provisions:

a. Informal Procedures -

(1) A grievant must, except as provided in (4) below, present the matter as an informal grievance and allow the agency an opportunity to resolve the issues. Failure to do so may be grounds for the rejection of a formal grievance. The presentation may be made either orally or in writing; however, regardless of the form, the grievant must clearly identify it as a grievance. Specific concerns and the corrective action the grievant is seeking must be identified.

(2) An informal grievance must be presented to the lowest level official in the organization who can make a decision on the matter being grieved. If that individual is not known to the grievant, the grievance shall be presented to the grievant's immediate supervisor who will determine whether he/she has the authority to decide the matter. If the official who receives an informal grievance determines that he/she lacks authority, the official will forward the grievance to the proper level in the agency and so inform the grievant.

(3) A determination will be made as to whether it is possible to resolve the informal grievance through corrective action, clarification or other adjustments. If resolution is not achieved, the official who is considering the grievance will give the grievant a memorandum which:

(a) Outlines the issues in the grievance and the attempts which were made to resolve them;

(b) informs the grievant that the informal stage has been terminated;

(c) advises the grievant that a formal grievance may be filed, the official with whom it may be filed and the time limit (no less than 10 calendar days) for filing; and

(d) advises the grievant that if the agency has not completed action within 90 days of the initiation of the informal grievance, the grievant may elevate the grievance to the Chief, EAS [see section A-5b(9)].

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(4) The informal grievance procedure will be waived and a formal grievance may be filed in the following circumstances:

(a) Where the Head of the Agency has been substantively involved in the matter with which the grievance is concerned, or

(b) where the matter being grieved is a disciplinary action (14-day suspension to a letter of reprimand) and the grievant has been afforded an opportunity to submit written and/or oral replies to a letter which proposed the action.

b. Formal Procedures -

(1) Filing - The grievant must file a formal grievance with the designated official and within the time limits set forth in the memorandum closing out the informal grievance. The time limits may be extended by the designated official for good cause shown by the grievant. The grievance must be in writing, must be signed by the grievant or the designated representative, must identify the matters a issue and specify the corrective action being sought. The grievance may not concern any matter which was not presented as part of the informal grievance except as specified in A-4c.

(2) Acceptance - The designated official will either accept the grievance for processing or reject the grievance because it:

(a) Is untimely;

(b) concerns a matter excluded from coverage of the system;

(c) was filed by an employee excluded from coverage by the system; or

(d) does not meet a processing requirement, e.g., the grievant did not first raise the matter as an informal grievance.

Any rejection of a grievance must contain notification that the rejection may be appealed to the Chief, EAS, OP, within 7 calendar days of receipt.

(3) Proposed Disposition - If the grievance is not rejected, the designated official or his/her representative will make any inquiry necessary to obtain sufficient facts to adjudicate the matter. The designated official will prepare and issue a written proposed disposition to the grievant.

The proposed disposition must advise the grievant as to the agency's position on the grievance issues and whether any adjustments or corrective actions are to be implemented. The proposed disposition must also notify the grievant of:

(a) The right to a final decision by the Head of the Agency or other appropriate official, with or without review by a Departmental factfinder, if the matter has not been resolved to the grievant's satisfaction.

(b) The time limit within which to request a final decision (not less than 10 days).

(c) The need to indicate in the request which items remain unresolved, the corrective action being sought and any additional arguments and evidence which the grievant wishes to have considered.

(d) That new issues may not be raised as a part of the grievance at this time except as set forth in A-4c above.

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(e) The agency's intention to close the grievance with no further action if the grievant does not submit a request for further review within the allotted time frame. In such an event, the proposed disposition will become the Department's final decision on the grievance. Questions as to whether a request for a final decision was timely will be resolved by the Chief, EAS, OP, in accord with Section A-6b(2).

(f) That a certified copy of the grievance file is attached for the grievant's review.

(4) Referral for Factfinding - Upon request of the grievant, the agency will promptly refer one copy of the grievance file containing all documents considered by the agency and the grievant's request to the Chief, EAS, OP. The referral will address the merits of any additional arguments and/or evidence presented by the grievant, will certify that the grievant has been given a copy of the complete grievance file, and will include an index of all documents contained in the file.

(5) Appointment of Factfinder - The Chief, EAS, OP, will appoint a factfinder from the Staff or other appropriate source to prepare a recommended decision. The factfinder must be an individual who has not been substantively involved in any aspect of the grievance previously. The Chief will insure that the factfinder selected is experienced in Federal administrative matters, is able to fairly analyze fact situations and to reach and effectively communicate reasonable conclusions.

c. Factfinding - The factfinder is responsible for conducting any inquiry necessary to resolve factual disputes and to sufficiently develop the record upon which to base a recommended decision. At the sole discretion of the factfinder, the methods utilized may include but are not limited to:

- (1) Review of records and documents
- (2) Personal interviews
- (3) Written inquiries
- (4) Hearings
- (5) Group meetings

The factfinder will insure that the grievant or the representative is given an opportunity to review and comment upon all information considered in arriving at the recommended decision. Information the factfinder receives from the grievant will be provided to the agency.

The factfinder will send the written recommended decision to the Head of the Agency in which the grievance was filed or higher level official as appropriate. A copy of the recommended decision will be given to the grievant or the representative at the same time. The recommended decision will record findings of fact, will contain an analysis of the issues and will recommend appropriate disposition of the grievance, including any corrective action which may be necessary.

d. Final Decision - The deciding official on a formal grievance will be the Head of the Agency in which the grievance was filed except where the Agency Head has had previous substantive involvement with any aspect of the grievance. In that case, the final decision must be made by a higher level official. In cases where the grievant has requested a final decision without review by a factfinder, the deciding official will review and analyze the case and issue a final decision to the grievant within 60 days of the complainant's request for a final decision.

In a case where the grievant requests review by a factfinder prior to a final decision, the deciding official may:

- (1) Adopt the recommendation of the factfinder as the final decision on the grievance.

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(2) Grant more relief to the grievant than recommended by the factfinder

(3) Appeal the factfinder's recommendation to the Department's Director of Personnel when the recommendation can be shown to be contrary to law, rule, regulation or published agency policy; supported by less than substantial evidence or to be setting a precedent of such wide and detrimental impact on the Agency that further review is warranted. Such an appeal must be made within 15 days of the deciding official's receipt of the factfinder's recommendation. The Director of Personnel may entertain requests for extensions of this time frame for good cause shown, provided such requests are filed within the 15 day period.

e. Appeal to the Director of Personnel - Upon appeal of the Agency Head, the Director will render the Department's final decision on the grievance after insuring that the grievant has had an opportunity to review and comment upon the Agency's appeal. There are no provisions for review of a final grievance decision outside the Department.